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California Bank & Trust as Assignee to the FDIC as
Receiver for Vineyard Bank, N.A.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In Re
David Kahn,
Debtor.

Case No. 10-12306-PB7

Chapter 7

Adversary No. 10-90636-PB7

**PLAINTIFF CALIFORNIA BANK &
TRUST'S OPPOSITION TO
DEFENDANT'S MOTION FOR
SANCTIONS PURSUANT TO FRBP 9011**

CALIFORNIA BANK & TRUST, a
California corporation, as Assignee of the
Federal Deposit Insurance Corporation as
Receiver for Vineyard Bank, N.A.,

Date: May 5, 2011
Time: 2:00 p.m.
Dept.: 4
Judge: Hon. Peter W. Bowie

Plaintiff,

v.

DAVID JEFFERY KAHN, individually
and as trustee of the DAVID J. KAHN
TRUST AGREEMENT DATED
OCTOBER 1, 1990,

Defendants.

Plaintiff California Bank & Trust as assignee of the FDIC as receiver for Vineyard Bank,
N.A. ("the Bank") hereby submits this Opposition to the Motion of defendant David Kahn
("Defendant") for Sanctions under Bankruptcy Rule 9011:

1 **I. INTRODUCTION**

2 Defendant's Motion seeks sanctions against plaintiff California Bank & Trust ("Bank")
3 and its counsel for allegedly filing a meritless lawsuit. When you pull back the layers of this
4 Motion and the Defendant's conduct over the course of this bankruptcy, it becomes clear that
5 Defendant is seeking to intimidate anyone willing to take the time to examine its assets and pre-
6 petition transfers. Defendant first attempted to avoid this adversary by assuring counsel for the
7 Bank and counsel for another creditor that the Defendant would agree to an extension of the
8 deadline to object to discharge, but subsequently suing for a declaration that such a complaint was
9 time-barred due to the expiration of that same deadline. When that did not work, Defendant
10 threatened the Bank with a sanctions motion for filing its complaint objecting to discharge,
11 making a host of unfounded and unscrupulous accusations.

12 The Bank is still not willing to back down, however, as it is confident that its claims are
13 valid and have both legal and factual merit. The Bank's counsel conducted a more than
14 reasonable inquiry into the facts before filing the Complaint and has listed below and in its
15 declaration the many sources of information that were exhausted in determining whether or not to
16 file the claims alleged in the Complaint. The Defendant has absolutely no evidence that the
17 Complaint was filed for an improper purpose. Instead, he points to a strange collaboration of
18 facts that he claims show the Bank's improper motives, namely that it **did not** seek sanctions
19 against Defendant for its meritless lawsuit, but instead chose to answer it on the date designated
20 by the Court as the answer deadline.

21 Because the Complaint contains claims that, based upon a reasonable inquiry, can be
22 shown to have both a legal basis and factual basis, supported by evidence, and because the
23 Complaint was not filed for an improper purpose, Defendant's Motion should be denied.

24 **II. BACKGROUND**

25 **A. The Guaranty Obligation**

26 On or about August 10, 2006, Plaintiff's predecessor in interest, Vineyard Bank, N.A.
27 ("Vineyard") entered into a loan agreement with Tres Hombres, LLC ("Borrower") by which
28 Vineyard agreed to loan Borrower, and Borrower agreed to repay, the principal sum of

1 \$5,222,000.00 (“Loan Agreement”). (Complaint, ¶¶ 5-6.) In connection with the Loan,
 2 Defendant executed a written guaranty of payment, by which Defendant agreed to repay the Loan
 3 should Borrower fail to do so. (Complaint, ¶¶ 12-13.) Timothy Karl Sears (“Mr. Sears”) also
 4 executed a written guaranty of payment, agreeing to repay the Loan should Borrower fail to do
 5 so. (Complaint, ¶ 13.) Beginning on or about November 10, 2008, Borrower defaulted on the
 6 Loan by failing to make the payments when due and subsequently failing to pay all outstanding
 7 principal and interest when the Loan matured. (Complaint, ¶ 15.)

8 **B. The Adversary Complaint by Defendant**

9 On July 13, 2010, Defendant filed for chapter 7 bankruptcy protection (“Petition Date”).
 10 The original deadline to file a complaint objecting to Defendant’s discharge was October 12,
 11 2010. Knowing that it would investigate and possibly file such a complaint, in mid-September
 12 2010, counsel for the Bank contacted counsel for Defendant and asked him if he would stipulate
 13 to an extension of the deadline to file a complaint objecting to discharge. (Declaration of Meghan
 14 Sherrill (“Sherrill Decl.”), ¶ 2.) Defendant’s counsel readily agreed and even offered to draft the
 15 stipulation himself. (Sherrill Decl., ¶ 3.) On September 16, 2010, Defendant’s counsel forwarded
 16 the discussed stipulation to counsel for the Bank, who signed the stipulation and returned it to
 17 Defendant’s counsel the same day. (Sherrill Decl., ¶ 3.) Counsel for Defendant then filed the
 18 stipulation, but neither party uploaded an order granting the stipulation. (Sherrill Decl., ¶ 4.)

19 On October 15, 2010, three days after the deadline to file a complaint objecting to
 20 discharge was originally set to expire, Defendant filed an adversary complaint against the Bank
 21 and another creditor, with whom Defendant had also entered into a stipulation extending the same
 22 deadline, seeking a declaration from the Court that any complaint objecting to discharge under 11
 23 U.S.C. §§ 523(c) and 727(a) is time barred. (Request for Judicial Notice (“RJN”), Exhibit A.)
 24 Defendant stated in the Complaint that while he had agreed to draft and execute a stipulation with
 25 the Bank, Defendant never stated that it would upload an order granting the same. (*Id.* at ¶¶ 10,
 26 19.) The Bank was understandably surprised at Defendants’ underhanded attempt to prevent
 27 filing of a dischargeability complaint, but immediately thereafter uploaded an order granting the
 28 stipulation, which the Court entered on October 21, 2010. (RJN, Exhibit B; Sherrill Decl., ¶ 6.)

1 By that order, the deadline to file a complaint objecting to discharge was extended to November
2 5, 2010.

3 On or about October 29, 2010, counsel for the Bank again contacted counsel for
4 Defendant and negotiated a stipulation further extending the date to file a complaint objecting to
5 discharge. (Sherrill Decl., ¶ 7.) On October 29, 2010, the Bank filed the agreed upon stipulation
6 extending the deadline to December 31, 2010, and on November 5, 2010, the Court entered an
7 order granting that stipulation. (RJN, Exh. C.)

8 On November 12, 2010, hoping to avoid the need to answer Defendant's complaint,
9 counsel for the Bank advised counsel for Defendant that now that the Court had signed two
10 orders, extending the deadline to file a complaint objecting to discharge to December 31, 2010,
11 Defendant's complaint was moot and should be dismissed. (Sherrill Decl., ¶ 8.) This email, and
12 Defendant's counsel's response, is attached to the Sherrill Declaration as Exhibit A.

13 On November 15, 2010, the date indicated on the summons issued by the Court as the
14 Bank's deadline to respond to Defendants' complaint, to be sure its rights were preserved, the
15 Bank answered Defendants' complaint. (RJN, Exh. D; Sherrill Decl., ¶ 9.) On December 2,
16 2010, the parties entered into a stipulation to dismiss the adversary and the next day, the Court
17 entered an order dismissing Defendant's adversary action. (RJN, Exh. E.)

18 **C. The Bank's Investigation of Dischargeability of Defendant**

19 The Bank first began investigation of the pre-petition acts of Defendant after reviewing its
20 schedules filed on the Petition Date. In or about mid-2006, Defendant, among others, provided
21 Vineyard with personally prepared financial information ("Financial Statement"), purportedly
22 detailing all of Defendant's assets and liabilities, in order to induce Vineyard to make the Loan to
23 Borrower. Counsel's review of this Financial Statement revealed that at that time, Defendant
24 represented that he owned six real properties which had a combined estimated value of
25 \$69,500,000. (Sherrill Decl., ¶ 10.) The fact that four years later Defendant indicated in his
26 Schedule A that he owns no real property at all raised a red flag and counsel for the Bank began
27 considering filing a complaint objecting to discharge. (Sherrill Decl., ¶ 11.) Counsel also
28 reviewed financial statements for Defendant obtained from the Bank which were dated July 2007

1 and January 2008, which revealed that at those times, Defendant purported to own significant real
2 property assets. (Sherrill Decl., ¶ 12.)

3 Examination of Defendant's Statement of Financial Affairs also reveals a number of
4 suspicious transactions to relatives of Defendant in the months leading up to the Petition Date.
5 (RJN, Exh. F.) Defendant made periodic payments to his sister throughout 2009 and 2010 for
6 amounts he allegedly owed. Defendant also made cash gifts to his sister-in-law, niece and
7 mother. These transfers, coupled with what Bank's counsel later learned from public records
8 searches and conversations with other counsel, contributed to counsel's decision to pursue a
9 section 727(a)(2) claim. (Sherrill Decl., ¶ 13.)

10 On September 1, 2010, Mr. Sears, a co-guarantor with Defendant on the Loan from
11 Vineyard, filed for Chapter 11 bankruptcy protection in the Southern District of California, case
12 no. 10-15781-MM11 ("Sears Bankruptcy Case"). (Sherrill Decl., ¶ 14.) On October 1, 2010,
13 counsel for the Bank spoke with counsel for Mr. Sears, Elliot Stone of Nowland Stone LLP.
14 (Sherrill Decl., ¶ 15.) In this telephone conversation, Mr. Stone informed the Bank's counsel that
15 his client had information regarding substantial transfers of assets by Defendant shortly before the
16 Petition Date, but that Mr. Sears would not willingly provide the details of this information
17 without an agreement from the Bank that it would not object to any chapter 11 plan proposed in
18 the Sears Bankruptcy Case. (Sherrill Decl., ¶ 15.) The Bank was not prepared to enter into such
19 an agreement at that time, and decided that if nothing else, it would get the details of said
20 information during discovery in the instant action. (Sherrill Decl., ¶ 16.) Counsel for the Bank
21 called Mr. Stone one more time in December of 2010, just before filing the adversary complaint,
22 to confirm that Mr. Sears was still willing to provide information regarding what was
23 characterized as Defendant's fraudulent transfers. (Sherrill Decl., ¶ 17.) Mr. Stone again
24 confirmed that Mr. Sears had such information and was willing to provide if the Bank agreed not
25 to object to Mr. Sears' plan. (Sherrill Decl., ¶ 17.)

26 In December of 2010, counsel for the Bank conducted a series of public records searches
27 to determine if there were any further grounds to file a non-dischargeability complaint. (Sherrill
28 Decl., ¶ 18.) Most notable was a Property Profile obtained from Fidelity National Title showing

1 that Defendant sold a \$1.5 million property on or about August 31, 2009, less than a year before
 2 the Petition Date. (Sherrill Decl., ¶19.) Despite this large sale, Debtor reports on his Schedule B
 3 to have only \$50 cash on hand and \$50 in a checking account. (RJN, Exh. F.)

4 The December 2010 records search also revealed that an entity by the name of Sunset
 5 View Properties LLC owns a property located at 5550 Warbler Way, La Jolla, CA, estimated to
 6 be worth approximately \$2.9 million, and that it has owned it since June of 2006. (Sherrill Decl.,
 7 ¶ 20.) In the Financial Statement provided around the same date, Defendant represented that
 8 piece of property as his asset. (Sherrill Decl., ¶ 10.) That property is listed as an asset for
 9 Defendant, admittedly through what appears to be an interest in Sunset View Properties LLC, in
 10 the July 2007 and January 2008 financial statements reviewed by counsel as well. (Sherrill Decl.,
 11 ¶ 11.) That real property, however, is not listed on Defendant's Schedule A and neither is any
 12 value for an interest in Sunset View Properties LLC listed in Defendant's Schedule B. (RJN,
 13 Exhibit F.)

14 **D. The Bank's Complaint Objecting to Defendant's Discharge**

15 After conducting an extensive investigations and reviewing all the above-listed
 16 discoveries, counsel for the Bank made the decision to file a complaint on behalf of the Bank on
 17 December 31, 2010, alleging claims under 523(a) and 727(a). (Sherrill Decl., ¶ 21.) Because
 18 counsel for the Bank believed that further investigation may reveal even more suspicious transfers
 19 on the part of Defendant, it drafted the complaint in broad language, so as to leave room for
 20 discovery of any further facts to support its claims. (Sherrill Decl., ¶ 22.) Unfortunately, this led
 21 the Court to grant Defendant's Motion to Dismiss the Complaint, but the Bank was allowed leave
 22 to amend its Complaint. (Sherrill Decl., ¶ 22.) The Bank intends to amend its pleading to include
 23 the specifics of the aforementioned facts, which were discovered through investigation before the
 24 filing of the initial complaint but through error of counsel, were not specifically pleaded. (Sherrill
 25 Decl., ¶ 23.)

26 **III. LEGAL STANDARD**

27 Federal Rule of Bankruptcy Procedure 9011 states that:

28 By presenting to the Court...a pleading...an attorney or unrepresented

party is certifying that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances –

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. . .

“The current version of the Rule requires only that an attorney conduct ‘an inquiry reasonable under the circumstances’ into whether ‘factual contentions have evidentiary support.’ *Hadges v. Yonkers Racing Corp.*, 48 F.3d 1320, 1330 (2d Cir. 1995) (“an attorney is entitled to rely on his or her client’s statements as to factual claims when those statements are objectively reasonable”). “The question we ask is whether the lawyer’s certification complies with an objective standard of reasonableness under the circumstances.” *FDIC v. Calhoun*, 34 F.3d 1291, 1296 (5th Cir. 1994). “With frivolousness, the key question is whether a pleading states an arguable claim.” *Stewart v. American International Oil & Gas Co.*, 845 F.2d 196, 201 (9th Cir. 1988).

“In imposing rule 11 sanctions, the court is to avoid hindsight and resolve all doubts in favor of the signer....Rule 11 is violated only when it is patently clear that a claim has absolutely no chance of success.” *Oliveri v. Thompson*, 803 F.2d 1265, 1275 (2d Cir. 1986).

IV. THE CLAIMS IN THE COMPLAINT ARE WARRANTED BY EXISTING LAW

The claims in the Complaint are clearly supported by existing law. Specific bankruptcy code sections exist in order to give creditors the exact relief that is being sought by the Bank and for the exact same reasons. Section 523(a)(2) specifically provides that a debtor will not be discharged from a debt obtained by use of a statement in writing that is materially false. The Bank has identified above numerous facts that while admittedly do not by themselves establish liability, led counsel to a reasonable belief that Defendant may have provided materially false financial information to the Bank. Either that, or Defendant has omitted material information

1 from its schedules and/or has hidden significant assets from the estate.

2 Section 727(a) provides specific grounds upon which the Court can find that the debtor is
3 not entitled to a discharge. In the Complaint, the Bank indentified specifically two of those
4 enumerated grounds, namely, that Defendant transferred property with intent to hinder, delay or
5 defraud a creditor within one year prior to the Petition Date and that Defendant has failed to
6 explain satisfactorily any loss of assets or deficiency of assets to meet his liabilities. The Bank
7 has evidence of a specific real property sale, which, from the date stamp at the bottom of the
8 website printout, can objectively be determined was obtained prior to the filing of the Complaint.
9 (Sherrill Decl., ¶¶ 18-20.) Moreover, the Bank and its counsel were confronted with a variety of
10 other evidence regarding transfers by Defendant and a huge deficiency of assets between the
11 January 2008 financial statement and the Defendant's Schedules. (Sherrill Decl., ¶¶ 10-20.) All
12 of these facts combined form a more than reasonable basis for the two 727 claims in the
13 Complaint.

14 **V. THE ALLEGATIONS HAVE EVIDENTIARY SUPPORT**

15 As demonstrated by the Declaration of Meghan Sherrill filed concurrently herewith,
16 counsel for the Bank conducted an extensive inquiry into the affairs of the Defendant before filing
17 its Complaint on December 31, 2010. It did a thorough search and analysis of public records,
18 including property profiles obtained from Fidelity National Title Company and a Comprehensive
19 Accurint Report through LexisNexis.¹ (Sherrill Decl., ¶¶ 18-20.) It spoke with counsel for
20 individuals who had prior financial and personal dealings with Defendant. (Sherrill Decl., ¶¶ 15-
21 17.) It examined the Bank's files and the Debtors Schedules and Statement of Financial Affairs.
22 (Sherrill Decl., ¶¶ 10-13.) Counsel obtained more than enough information to provide grounds
23 for the claims asserted in the Complaint, and has a reasonable belief that even more will be
24 uncovered through discovery in this action.

25 **VI. THE COMPLAINT WAS NOT FILED FOR AN IMPROPER PURPOSE**

26 In the Motion, Defendant makes unsubstantiated and unwarranted claims against counsel

27 ¹Due to the sensitive personal and financial information contained in the Accurint Report from LexisNexis, including
28 partial social security numbers, the Report is not attached to the Sherrill Declaration. Counsel for the Bank will,
however, bring a copy of the report to the hearing on this Motion should the Court wish to review it.

1 for the Bank on grounds that simply make no sense. First, Defendant alleges that the Bank and its
2 counsel only filed this dischargeability complaint in order to “get back at” Defendant for filing a
3 lawsuit against the Bank. As an initial matter, this makes no sense, as the Bank was clearly
4 anticipating pursuing claims objecting to discharge prior to the filing of Defendant’s adversary, or
5 it would not have bothered contact Defendant’s counsel to obtain a stipulation extending the
6 deadline. Moreover, counsel for the Bank had its conversation with counsel for Sears on October
7 1, 2010, two weeks before Defendant filed an adversary against the Bank, and was told in no
8 uncertain terms that there was substantial evidence to be had that Defendant attempted to hide
9 assets from the bankruptcy estate. Lastly, Plaintiff has not one scintilla of evidence supporting its
10 claims that the Bank had improper motives in filing its Complaint.

11 Defendant points to an email from Bank’s counsel to its own counsel regarding the
12 adversary filed by Defendant in October. While the adversary was, at best, tenuous from
13 inception, and at worst, unethical, it clearly lost any merit when the Court signed the Orders
14 extending the deadline to object to discharge to December 31, 2010. There was nothing
15 inappropriate about counsel’s email to Defendant’s counsel. And now, Defendant goes so far as
16 to complain about the fact that the Bank did not seek sanctions against it and claim that this is
17 evidence of improper motives. Lastly, Defendant points to the fact that the Bank filed an answer
18 to Defendant’s complaint as evidence that the Bank has improper motives against Defendant.
19 The summons issued by the bankruptcy court clearly ordered that the Bank answer the Complaint
20 by November 15, and understandably cautious of the need to protect its rights against an
21 adversary that is willing to file a complaint for failure to upload an order for a stipulation it filed,
22 the Bank answered by that date.

23 Neither the Bank, nor its counsel, filed the Complaint for any improper purpose. Rather,
24 the Bank seeks only to ensure (i) that the Loan was not obtained by any fraudulent means, (ii) that
25 if assets exist to pay the more than \$1.5 million dollars it is admittedly owed, such assets are used
26 to pay the debt, and (iii) that if assets were dissipated fraudulently, Defendant’s debt is not
27 discharged. (Sherrill Decl. ¶ 24.)
28

1 **VII. CONCLUSION**

2 For all these reasons, the Bank respectfully requests that the Court deny Defendant's
3 Motion for Sanctions pursuant to Rule 9011. In addition, the Bank requests that it be awarded its
4 reasonable attorney's fees incurred in defending against this Motion.

5 Dated: April 18, 2011

TROUTMAN SANDERS LLP

7
8 By: /s/ Meghan C. Sherrill

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